

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32501

BENJAMIN A. JONES,	)	2008 Unpublished Opinion No. 494
	)	
Petitioner-Appellant,	)	Filed: June 4, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Jon J. Shindurling, District Judge.

Order summarily dismissing application for post-conviction relief, reversed and remanded.

Dennis A. Benjamin of Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Thomas Tharp, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge

Benjamin A. Jones appeals from the district court's order summarily dismissing his application for post-conviction relief. Specifically, Jones asserts that the district court erred in denying his request for appointment of post-conviction counsel. Because we conclude that the district court should have appointed Jones post-conviction counsel, we reverse the district court's order summarily dismissing Jones's application and remand for further proceedings.

I.

FACTS AND PROCEDURE

After police and state social workers entered Jones's home and discovered his four minor children living in intolerable conditions, the state charged Jones by amended information with four counts of injury to a child, once for each of his children. I.C. § 18-1501(1). Prosecutors reached a plea agreement with Jones whereby he would plead guilty to one count of injury to a child in exchange for the dismissal of the remaining three counts. The state filed a second

amended information, which cited I.C. § 18-1501(1) and alleged that Jones “on or about March 24, 2003, in the County of Bonneville, State of Idaho, did, under circumstances likely to produce great bodily harm or death, commit an injury upon a child under eighteen year [sic] of age, of the age of 13 years, by malnutrition and unlawfully using drugs in the home (up to 10 years, \$5,000.00 fine + restitution).” After Jones pled guilty to the charge set forth in the second amended information, the district court imposed a unified sentence of ten years, with a minimum period of confinement of five years. Jones filed an I.C.R. 35 motion for a reduction in sentence, which the district court denied. Jones appealed, challenging the charging document, his sentence, and denial of his Rule 35 motion. *State v. Jones*, 140 Idaho 755, 101 P.3d 699 (2004). Because Jones did not properly preserve for direct appeal a due process challenge to the charging document, the Idaho Supreme Court addressed the validity of the charging document only on jurisdictional grounds. Thus, although the Court stated that “the information filed against Jones omitted elements of the charged offense,” the Court held that the information was sufficient to confer jurisdiction. *Jones*, 140 Idaho at 759, 101 P.3d at 703. The Idaho Supreme Court affirmed Jones’s judgment of conviction, his sentence, and the denial of his Rule 35 motion.

Jones filed a pro se application for post-conviction relief, with an affidavit attached, and a motion for appointment of post-conviction counsel. Jones’s application set forth claims that Jones received ineffective assistance of counsel, there was newly-discovered evidence, the district judge relied on biased information at sentencing, and Jones’s guilty plea was rendered involuntary by counsel’s false promises that Jones would not be incarcerated. Among the items of newly-discovered evidence listed in the application, Jones claimed “Idaho Supreme Court ruling the injuries sustained by child has to be intentional.” Additionally, in Jones’s affidavit, Jones averred, in part, that trial counsel failed to inform Jones that “any injury to the child had to be intentional.”

The district court denied Jones’s motion for appointment of post-conviction counsel, without providing any reasoning, and issued a notice of intent to dismiss Jones’s application. After several months passed without dismissal of Jones’s application, Jones filed a motion to “reopen” his post-conviction action. This motion purported to have medical records attached and asserted that Jones would bring additional claims of ineffective assistance of counsel if permitted to proceed. At the same time, Jones also filed a second motion for appointment of post-conviction counsel. The district court again denied Jones’s motion for appointment of counsel,

without providing any reasoning, and summarily dismissed Jones's application. Jones appealed. The Idaho Supreme Court appointed the state appellate public defender's office, which had also represented Jones in his underlying criminal appeal. Jones, acting through counsel, filed an appellate brief challenging the adequacy of district court's notice of intent to dismiss the application. The state moved to remand to the district court so that the district court could issue a proper notice of intent to dismiss, and the Supreme Court remanded the case.

On remand, the state filed an answer to Jones's application and a motion for summary dismissal. Jones again filed a motion for appointment of post-conviction counsel. The district court issued a second notice of intent to dismiss Jones's application, wherein the district court rejected each of the claims it found to be set forth in Jones's pro se application and affidavit. The district court also denied Jones's motion for appointment of post-conviction counsel on the ground that Jones's application and affidavit "failed to alleged facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim." In response, Jones filed affidavits of himself and a woman claiming to be his daughter.

The district court summarily dismissed Jones's application. Appellate counsel who had represented Jones prior to the remand to the district court filed a motion to withdraw, which the Idaho Supreme Court granted. Jones again appeals, having filed a revised appellate brief with the assistance of substitute appellate counsel.

## **II.**

### **ANALYSIS**

Jones asserts that the district court erred in denying his motion for appointment of post-conviction counsel because his pro se application and affidavit alleged facts that raised the possibility of valid claims of ineffective assistance of trial counsel and appellate counsel. Because we hold it dispositive, we address only Jones's assertion that his application and affidavit raised the possibility of a valid claim that trial counsel provided ineffective assistance by failing to advise Jones of the nature of the charges against him prior to pleading guilty. Specifically, Jones asserts that trial counsel failed to inform him of the willfulness element of felony injury to a child and he would not have pled guilty had he been aware of that element of the charged offense.

If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). When a district court is presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111; *Fox v. State*, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997). The district court abuses its discretion where it fails to determine whether an applicant for post-conviction relief is entitled to court-appointed counsel before denying the application on the merits. *See Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

In determining whether to appoint counsel pursuant to Section 19-4904, the district court should determine if the applicant is able to afford counsel and whether the situation is one in which counsel should be appointed to assist the applicant. *Id.* In its analysis, the district court should consider that applications filed by a pro se applicant may be conclusory and incomplete. *See id.*, at 792-93, 102 P.3d at 1111-12. Facts sufficient to state a claim may not be alleged because they do not exist or because the pro se applicant does not know the essential elements of a claim. *Id.* Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel. *Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). However, if an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the

claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

In order to be valid, a guilty plea must be voluntary, and voluntariness requires that the defendant understand the nature of the charges to which he or she is pleading guilty. *Martinez v. State*, 143 Idaho 789, 792, 152 P.3d 1237, 1240 (Ct. App. 2007). Failing to inform a client of an element of the charged offense prior to advising the client to plead guilty to the charge, when the client has denied the existence of that element, cannot be a tactical or strategic decision. *Martinez*, 143 Idaho at 795, 152 P.3d at 1243. Rather, such a failure falls below an objective standard of reasonableness. *Id.*

In the present case, the state charged Jones in the second amended information with committing a felony injury upon a child by malnutrition and unlawful use of drugs in the home. Idaho Code Section 18-1501(1) provides:

Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one (1) year, or in the state prison for not less than one (1) year nor more than ten (10) years.

A plain reading of section 18-1501(1) indicates that its purpose is to punish conduct or inaction that *willfully* causes a child to suffer. *State v. Young*, 138 Idaho 370, 373, 64 P.3d 296, 299 (2002); *State v. Halbesleben*, 139 Idaho 165, 169, 75 P.3d 219, 223 (Ct. App. 2003). The purpose of the statute is not to punish mistakes in judgment that are reviewed in hindsight. *Young*, 138 Idaho at 373, 64 P.3d at 299. In *Young*, the state proceeded under the clause prohibiting conduct that "willfully causes or permits any child to suffer" based on Young's failure to seek reasonable medical attention for a child. The Supreme Court held that there must be a showing that Young's failure to obtain reasonable medical attention was done with

knowledge that such failure would cause unnecessary suffering or unjustifiable physical pain. *Id.* In *Halbesleben*, the state proceeded under the clause prohibiting conduct that “willfully causes or permits such child to be placed in such situation that its person or health is endangered.” This Court held that state was required to prove Halbesleben willfully endangered the child by subjecting the child to a known risk of harm. *Halbesleben*, 139 Idaho at 170, 75 P.3d at 224.

In the application, Jones alleged that there was newly-discovered evidence, including the “Idaho Supreme Court ruling the injuries sustained by child has to be intentional.” This appears to be a reference to the Idaho Supreme Court’s opinion in Jones’s direct appeal, wherein the Court held: “Willfulness is a necessary element of felony injury to a child because it is named in the statute and without willful intent the information would describe a non-crime.” *State v. Jones*, 140 Idaho 755, 758, 101 P.3d 699, 702 (2004). Jones averred in his affidavit that counsel never informed him that “any injury to the child had to be intentional.” Additionally, at the sentencing hearing, Jones stated, “I never intentionally hurt my children. Anything that has come to them, any harm, has been unintentional.” Jones would satisfy the deficient performance prong of the *Strickland* test if he proved that counsel failed to inform him of the intent element prior to advising Jones to plead guilty to the charge, when Jones denied the existence of such intent. *See Martinez*, 143 Idaho at 795, 152 P.3d at 1243.

We are not persuaded by the state’s assertion that Jones failed to raise the possibility that he could prove the deficient performance prong of this potential claim because the state was only required to prove that Jones acted with willful neglect. According to the state, trial counsel would have been incorrect if he had informed Jones that any injury to the child had to be intentional. Contrary to the state’s contention, however, the statute does not criminalize “good faith decisions that turn out poorly.” *Halbesleben*, 139 Idaho at 170, 75 P.3d at 224. The second amended information does not clearly indicate the theory contained in I.C. § 18-1501(1) under which Jones was prosecuted.<sup>1</sup> If the state charged Jones under the clause prohibiting conduct that “willfully causes or permits the person or health of such child to be injured,” the state would have been required to prove at trial that Jones intended to injure the child. *See Young*, 138 Idaho

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<sup>1</sup> We note the Idaho Supreme Court in Jones’s direct appeal stated that “the poorly drafted information filed against Jones arguably failed to include the needed factual specificity to satisfy due process requirements.” *Jones*, 140 Idaho at 758, 101 P.3d at 702.

at 373, 64 P.3d at 299. Even if the state charged Jones under an endangerment theory, the state would have been required to prove that Jones placed the child in a potentially harmful situation with knowledge of the danger. *See Halbesleben*, 139 Idaho at 170, 75 P.3d at 224. In either scenario, Jones's affidavit raised the possibility that counsel failed to inform Jones of the mental element. Furthermore, as a pro se applicant, Jones was not required to recognize any distinction between "willful endangerment" and the intent element in I.C. § 18-1501(1). At this stage of the proceedings, Jones has raised the possibility of a valid claim that trial counsel inadequately advised him regarding the intent element such that a reasonable person would hire an attorney to further investigate the possibility of deficient performance.

To satisfy the prejudice prong of the *Strickland* test, Jones would need to prove that if he had been aware of the intent element he would have proceeded to trial. The record before us does not negate Jones's assertion that he was unaware of the intent element prior to pleading guilty. None of the charging documents in the record alleged that Jones's conduct satisfied the intent element. The record before us does not contain a transcript of the change of plea hearing and we are therefore unable to determine with certainty whether the district court informed Jones of the intent element prior to pleading guilty. Allegations contained in an application are insufficient for the granting of relief when they are clearly disproved by the record of the original proceedings. *Workman v. State*, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007). The state does not assert, however, that the district court informed Jones of the intent element at the change of plea hearing. Furthermore, Jones's statement at the sentencing hearing that any harm to his child was unintentional further supports Jones's assertion that, due to counsel's failure to inform him of the intent element, he was unaware of the element. Although Jones did not specifically aver that he would have proceeded to trial if he were aware of the intent element, Jones was not required to properly formulate such an averment in his pro se application and affidavit in order to be entitled to appointed counsel. Jones's application and affidavit, read in conjunction with his statement at the sentencing hearing that his conduct was unintentional, raise the possibility that he could prove he would not have pled guilty had he been aware of the intent element.

Finally, we are not persuaded by the state's assertion that Jones failed to properly raise in post-conviction proceedings below the claim of ineffective assistance for failure to advise Jones regarding the intent element prior to pleading guilty. The state is correct that the claim was not expressly articulated in Jones's pro se application as well as it is articulated in his revised

appellate brief. Additionally, the district court did not directly address this possible claim in the second notice of intent to dismiss. However, in light of the Supreme Court's statements in Jones's direct appeal regarding the inadequacy of the second amended information, Jones's application and affidavit clearly set forth facts which raised the possibility of a valid claim of ineffective assistance for failure to properly advise Jones regarding the elements of the offense prior to pleading guilty. When considering a motion for appointment of counsel, the trial court must do more than determine whether the application alleges a valid claim. *Swader v. State*, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007). *See also Workman*, 144 Idaho at 529, 164 P.3d at 809. A pro se petitioner may be unable to present sufficient facts showing that his or her counsel's performance was deficient or that such deficiency prejudiced the defense because that showing will often require the assistance of someone trained in the law. *Swader*, 143 Idaho at 654-55, 152 P.3d at 15-16. The decision to appoint counsel and the decision on the merits of the application if counsel is appointed are controlled by two different standards. *Id.*, at 655, 152 P.3d at 16. The district court was required to review the *alleged facts* to determine if Jones made a showing of the *possibility of a valid claim* such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim. *See id.* The district court abused its discretion when it concluded under that standard Jones was not entitled to appointment of post-conviction counsel.

We do not address the potential validity of any additional claims based on the facts alleged in Jones's pro se application and affidavit because doing so may prejudice Jones's opportunity to adequately develop such claims with the assistance of appointed counsel. On remand, the district court is instructed to appoint post-conviction counsel and permit Jones to file an amended application for post-conviction relief wherein Jones may raise any meritorious claims for post-conviction relief with counsel's assistance, placing Jones and the state in the position they would have been had the district court not erred.

### **III.**

### **CONCLUSION**

The district court abused its discretion when it denied Jones's motion for appointment of post-conviction counsel. We therefore reverse the district court's order summarily dismissing Jones's application for post-conviction relief and remand for further proceedings consistent with



this opinion. Costs if any were actually incurred, but not attorney fees, are awarded on appeal to Jones.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**